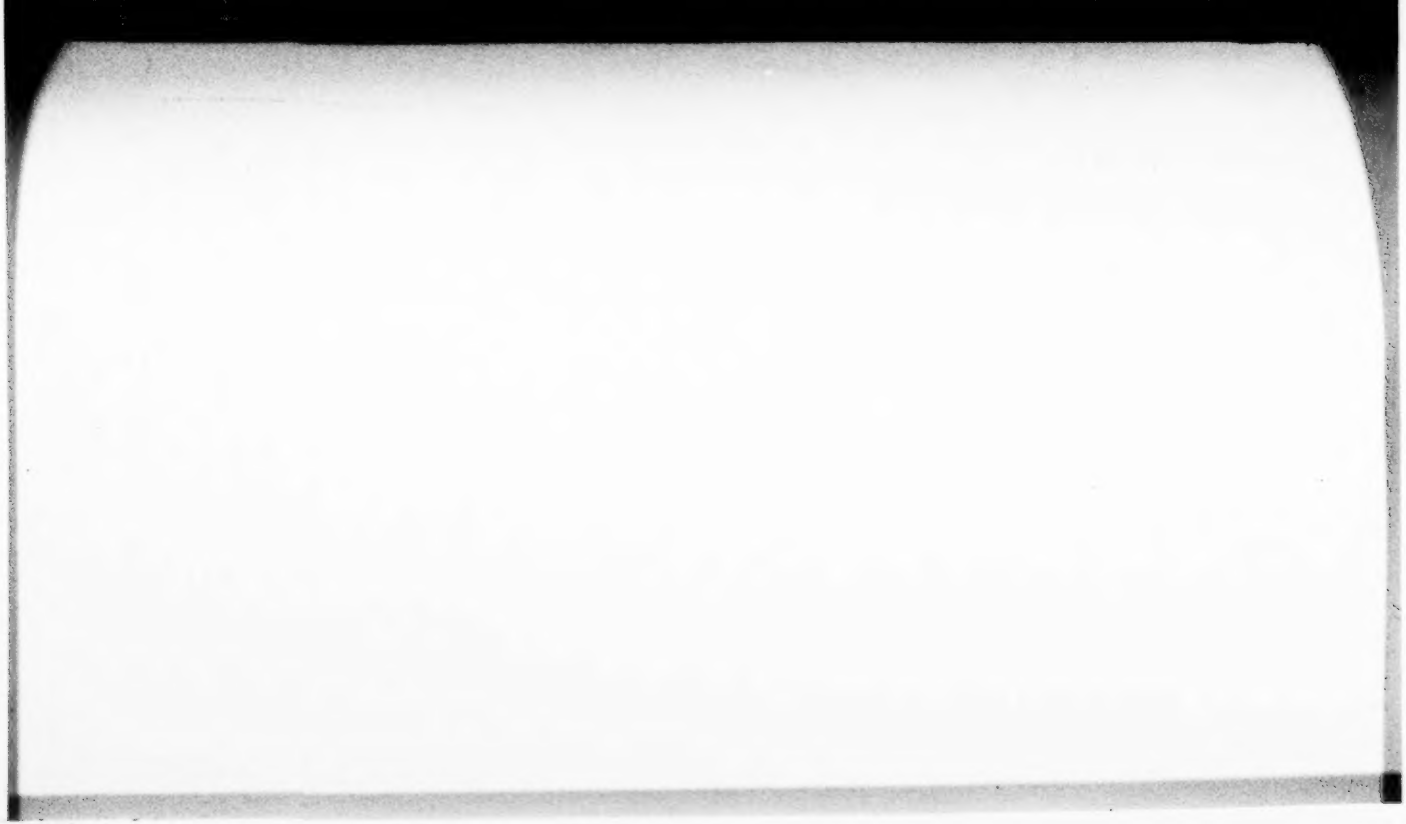

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901,

NO. 134

THE SKANEATELES WATER WORKS COMPANY, PLAINTIFF IN ERROR,

VS.

THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, AS PRESIDENT OF SAID VILLAGE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF DEFENDANTS IN ERROR.

This action was brought to restrain the defendants

from the construction and operation of a system of water works in the Village of Skaneateles, Onondaga County and State of New York, upon the ground that by virtue of a franchise granted by the said village of Skaneateles to the plaintiff, and a five years' contract to supply water, made between the trustees of the village and the plaintiff that it (the plaintiff) acquired the exclusive right to furnish water to said village and its inhabitants as against said village; that the village is estopped from establishing works of its own although it has the power to grant a similar franchise to another water corporation.

In the year 1887, a franchise was granted by the village of Skaneateles to the plaintiff to supply the village and its inhabitants with water, with a provision that the plaintiff should not charge the village for water supply to it more than $40 per annum per hydrant.

Page 61. Fol. 128.

Under this franchise the plaintiff constructed a plant which should not have cost over $30,000. In the year 1899, a contract was entered into between the plaintiff and the trustees of the village for a period of five years by which the plaintiff agreed to furnish water to the village at the rate of $30 per annum per hydrant. One hundred and fourteen of the tax payers of the village filed a written remonstrance against the execution of this contract. They constituted a majority of the tax payers.

On September 14, 1899, a resolution was adopted by the same trustees notwithstanding the remonstrance of the said tax payers, reciting that the plaintiff corporation had failed to complete its works and renewing

said franchise, and extending the time of completion of the plaintiff's works until Dec. 1, 1890, on the condition that said franchise should be void if said company should not have completed its works within one year from Dec. 1, 1889, and providing that the contract made by said village with said company should continue to be binding upon said company.

(Fol. 9—14.)

In the latter part of 1889 or 1890, the plaintiff procured a civil engineer to make plans and estimates of the cost of constructing the water plant, and he reported that the same would be $29,000.

(Fol. 269—273.)

Thereafter and before Feb. 21, 1891, the water plant of the plaintiff was completed; cement pipes being used in its construction. A resolution was then adopted by the trustees of the village that the contract above mentioned should commence on the 1st. day of Feb. 1891. (Fol. 14.) This contract with the village therefor expired Feb. 1, 1896.

The plaintiff on the 22nd. day of Aug., 1890, executed a mortgage upon its plant to secure the payment of $40,000 of the bonds issued by it (Fol. 417). Previous to that time it had issued its whole capital stock amounting to $40,000. (Fol. 143.)

In 1894 the stock was increased to $50,000 (Fol. 94.) Upon Feb. 1, 1895 another mortgage was given to secure $10,000 more of bonds issued by the plaintiff (Fol. 16—418.) The amount of stock and bonds issued by the plaintiff was grossly out of proportion to the cost of the plant.

No agitation had arisen in the village against the renewal of the contract at the rate of $30 per annum

per hydrant. (Fol. 66.) A short time before its expiration, the plaintiff informed the village that it would not renew the contract for less than $50 per annum per hydrant. (Fol. 22; 23, page 11.) And wrote the village president as follows:

"We are compelled to inform you that we cannot renew this contract at the old rate. The present rate is $30 per hydrant, the rate of renewing will be $50 per hydrant. * * * * * If the village should decide not to take water on the terms proposed, notice will be given of the date when the hydrants will be closed."

(Fol. 64—68.)

A special election of the electors of the village was held to determine whether the contract should be renewed at that rate, and by a large majority it was decided that it should not be done. The plaintiff then dismantled the hydrants and cut off the water supply of the village. (Fol. 72—77 inc., page 34, 35, 36.) And wrote the plaintiff as follows:

"With very much regret, and solely for the purpose of protecting the interests of the Skaneateles Water Works Company, and after consultation with the stock holders, and with their approval and by their direction, I give you formal notice that the hydrants in your village, forty in number, have been closed."

"We give this notice because we wish it clearly understood that if an isolated fire should occur, or if an extensive conflagration should be threatened; there must be no interference with the hydrants; not that we think there would be, but because we have heard it suggested that the village can refuse to enter into a contract for hydrant rentals, and then in the event of

a conflagration expect the water company to furnish water with which to extinguish it; while there are some in every community who would expect to forcibly open the hydrants in such an event. We wish it understood that the works of the Company, whether closed or open, are under your protection. We require that they be protected as closed, and in event that they shall be opened by you as a justifiable procedure in the face of great danger, or under your sanction, or by any other person with or without responsibility, for the purpose of extinguishing fires, we shall make a charge against you in each instance of two thousand dollars, as the reasonable value of the service which may be rendered.

"We should say, however, that we have directed Mr. Burton to reduce the pressure on the pipes, as the water is not needed for fire protection, and nothing in the foregoing shall obligate the company in any event to resume the former pressure, or keep the pipes supplied in event of fire."

Water commissioners were then appointed by the village, and a meeting to ballot on the subject, called by the trustees, held on the 9th day of May, 1896, under the statue, (Chapter 181 of the Laws of 1875, and acts amendatory thereto) to determine whether the village should establish works of its own, and levy its taxes therefor. Just previous to this meeting the plaintiff stated that they were willing to furnish water at the rate of $40 per annum per hydrant. At that meeting by a large majority it was decided by ballot that the village should establish its works and water taxes were levied and collected for that purpose. (Fol. 11, page 6.)

After such election the water commissioners endeavored to purchase the works of the plaintiff and offered it $24,000 for the same.

(Fol. 108, page 51.)

The plaintiff refused to accept even $30,000 for them.

(Fol. 106, page 50.)

The village has since constructed a plant at a cost of less than $30,000, and now in successful operation of the same.

(Fol. 92, page 43.)

The Court in 161 N. Y. says at page 170:

That if the discriminating features of the acts of 1894 were eliminated, it would in no wise interfere with the just and proper working out of the general purpose of the act, which is to enable municipalities to provide for an independent system of water works, to be owned and controlled by municipal authorities. Upon this question the plaintiff in error comes to this Court to have determined whether or not the remainder of the statute in question is constitutional.

"The act concerning establishing a scale of water rates was originally enacted by Chapter 507 of the laws of 1889, which is as follows:

Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of one thousand eight hundred and seventy-five, and acts amendatory thereto, may annually establish a scale of water rates for the use of water, also rates to be assessed upon all real property abutting on the streets where the water pipes are laid. A day shall be appointed by the board for hearing grievances against such assessment, and said assessment shall be subject to re-

view as other assessments. Upon completion of said assessment the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees; upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes. The provisions of this act shall not apply to the counties of Kings, Queens, Richmond and Suffolk.

§ 2. This act shall take effect immediately."

That act was amended by Chapter 662 of the laws of 1893, which is as follows:

"Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of eighteen hundred and seventy-five and acts amendatory thereof, may establish a scale of rates for the use of water *and also rates for fire protection* to be assessed on all real property abutting on the *mains or within two hundred feet of the hydrants, the owners or occupants of which do not use the water for domestic or manufacturing purposes.*"

The remainder of the chapter is precisely the same as the Act of 1889.

That act was amended by Chapter 284 of the laws of 1894, which is as follows:

"Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of eighteen hundred and seventy-five, and acts amendatory thereof, may establish a scale of rates for the use of water *and also rates for fire protection*, to be assessed on all real property abutting on the *mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is*

not used by the owners or occupants thereof for domestic or manufacturing purposes. A day shall be appointed by the board for hearing grievances against such assessment, and said assessments shall be subject to review as other assessments. Upon completion of said assessment the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees. Upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes. The provisions of this act shall not apply to the counties of Kings, Queens, Richmond and Suffolk.

§ 2. This act shall take effect immediately."

POINTS.

I.

THERE ARE NO EQUITIES EXISTING IN THIS CASE IN FAVOR OF THE PLAINTIFF.

The defendant village has not attempted to confiscate the property of the plaintiff, but has been forced into establishing works of its own by the illegal acts and tyrannical conduct of the water corporation.

The incorporators of the plaintiff entered into a speculative enterprise for the purpose of making money. They obtained from the trustees of the village on the 5th day of July, 1887, a franchise allowing a corporation, to be formed by them, to supply water to the village and its inhabitants (Fol. 379.) Shortly afterwards and on the 12th day of July 1887, they formed the plaintiff corporation. (Fol. 388.)

The statute which the Court of Appeals holds to be unconstitutional became the law June 15, 1889, two years before the plaintiff began the construction of their plant.

In October 1884, the Court of Appeals, of the State of New York, in People ex rel, The Mills Water Works Co. vs. Forrest et al, 97 N. Y., 97, Danforth J. says, at page 100, "The State authorizes the formation of water works companies in its towns and villages (Laws of 1877, page 171,) but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed."

In April, 1886, the General Term of the Fourth Department had decided that the Syracuse Water Company obtained no exclusive rights by a similar franchise (Hun. 635.) That case was affirmed by the Court of Appeals October 8, 1889, (116 N. Y., 168.) so that before plaintiff had expended a dollar, it knew that the Court of Appeals of the State of New York had decided that the granting of a franchise like the plaintiff's did not prevent the granting of a similar franchise to another corporation, and that such franchise and a request of the municipality to supply water did not constitute a contract on the part of the latter to take water, in perpetuity, from the corporation. These decisions were notorious, and with these facts staring them in the face, the plaintiff solicited and obtained the limited franchise, which was all the village could give, taking the chances of the village establishing works of its own, or granting a franchise to another corporation.

The water corporation waited for nearly two years,

and until there had been a change in the Board of Trustees, before making an application for a contract. In April, 1889, J. D. Barrow, a brother of George Barrow, the attorney, and principal promoter of the water corporation, had become one of the village trustees. Mr. Shepard had also become another trustee. He was a relative and business partner of Mr. Hall, who was then holding $10,000 of the stock of the Water Company, and a director therein. Upon April 20, 1889, these two trustees, and one Kelly, another trustee, in the absence of the president, adopted a resolution authorizing a five years contract between the water corporation and the village for the sum of $30 per hydrant per annum. A written remonstrance was filed against the execution of this contract, signed by one hundred and fourteen of the tax payers of the village, constituting a large portion of the same. The population of the village of Skaneateles was only 1559 in 1890. (Red Book 1890, page 522.) Subsequently, and in April, 1889, a contract was entered into between the village and the water corporation to take water from said corporation for the period of five years at the rate of $30 per hydrant per annum. On the 14th day of September, 1889, these *same* trustees, at a special meeting in the absence of the president, notwithstanding said remonstrance, adopted a resolution renewing said franchise, ratifying said contract, and extending the time of the completion of plaintiff's works until Dec. 1, 1890. (Fol. 13.)

Although, this contract was made by these trustees against the will of the tax payers, there was no further opposition thereto. It expired by its terms Feb. 1, 1896, and no agitation had arisen among the inhabi-

tants against its renewal. When, however, it was about to expire, the plaintiff, finding it difficult to pay interest on its watered stock and bonds, as it claimed, endeavored to *force* the village to give it $50 per annum per hydrant, in violation of the terms of its franchise by threatening *to cut off* the water supply of the village, if the plaintiff's demands were not complied with, and on January 2, 1896, served a written notice on the trustees that the water supply would be cut off, unless $50 per annum per hydrant was paid. A meeting was then called of the electors of the village, who voted on the 28th day of January, 1896, against the renewal of the contract by the village at the rate of $50 per annum per hydrant, and the trustees refused to renew the same at that rate. The plaintiff then *dismantled* the hydrants and *cut off* the water supply of the village.

The same state of facts existed which had previously arisen in the City of Syracuse. It was owing to the exorbitant demands of the Syracuse Water Company having a similar franchise, that said city granted a new franchise to another water corporation. Had the course adopted by the plaintiff been pursued by the Syracuse Water Company, and the water supply of that city cut off, there would have been a public riot.

The Skaneateles Water Works Company, with no binding obligation requiring the village to take water from that corporation, has goaded and prodded the inhabitants of the village into establishing works of its own.

After the plaintiff had created this sentiment against it by its extortionate demands, and unlawful acts, and water commissioners had been appointed, and an elec-

tion was about to be held upon the question whether the village should own its own works, the plaintiff offered to supply water at the rate of *$40 per annum* per hydrant. The electors, however, determined that the village should have its own water system, instead of the plaintiff's dictating the price of water, and no one can blame them for doing so under the circumstances.

After such election, the water commissioners, before building their works, in good faith endeavored to purchase the plant of the plaintiff and offered $24,000 for the same. They would have been willing to pay $30,000. The plaintiff's plant was laid with cement pipes, and was not worth over $15,000. The plaintiff instead of accepting this offer, or considering the same, informed the water commissioners that it would not take $30,000 for its property, and requested them to institute proceedings to condemn their plant.

The commissioners had before their eyes the large awards made and the enormous counsel fees paid, by the City of Syracuse in condemnation proceedings of water rights of moderate value on the Skaneateles outlet, which were opposed by the same able counsel who are acting for the plaintiff in this action, and wisely refrained from instituting such proceedings.

The water corporation had no right to *dictate* to the village what sum the village should pay for the use of water. They were obliged to furnish water when requested. If no agreement was reached, then it would have to be ascertained by some method of legal procedure. They could not, in any event obtain more than $40 per hydrant. 82 Hun 530

It is quite evident, from the evidence in this case, that the plaintiff *caused* the action of the village of

which it complains, by its intemperate conduct, and violation of the terms of its franchise.

It is questionable, whether the acts of the plaintiff in refusing to furnish the village with water at less than $50 a hydrant, and cutting off the water supply of the village, was not such a violation of its franchise, as to entitle the defendant to treat the same as rescinded. These facts were set up as a defense in the answer, but the referee did not find it necessary to pass upon those questions. (Fols. 562—566.)

Where a corporation is engaged in the transaction of business by virtue of a municipal franchise, the granting of a similar franchise to another corporation, or the transaction of the same business by the municipality itself, necessarily involves a great injury to the property of the first corporation in the field, and sometimes its total destruction. This is a *risk of the trade* which corporations take who solicit franchises from municipalities for the purpose of making money.

The village has no power to levy any tax except the general tax and the tax for fire protection authorized by section 230, Chap. 414, Laws of 1897.

POINT

11.

THE VILLAGE IS NOT ESTOPPED FROM ESTABLISHING A WATER SYSTEM OF ITS OWN BY THE FRANCHISE GRANTED TO THE PLAINTIFF. THE CONTENTION OF THE PLAINTIFF IN ERROR TO THE CONTRARY IS DIRECTLY OPPOSED TO ALL THE AUTHORITIES UPON THE SUBJECT.

Where a simple franchise is granted by a municipality to a corporation, all the latter acquires is the right to exercise *that franchise*. The only contract the grantor makes, express or implied, is to allow the grantee to *carry on* the business authorized by the franchise. The municipality in such cases retains all the rights it has not expressly granted. It may grant similar franchises, or engage in business of the same nature. If it can grant similar franchises to others, such franchises and rights are reserved, and not included in the original grant. What it can confer upon others, it may exercise itself. The rule is fully established in England and America, that public grants are to be construed against the grantee; that acts granting franchises to corporations are to be construed strictly according to their terms; that the party accepting the franchise takes nothing by implication against the *power* making the grant, or against other corporations or individuals; that the only contract on the part of the *grantor* is that it will not *do* any act, or *refrain* from doing any act, other than to allow the exercise of the franchise.

Syracuse Water Company vs. City of Syracuse,
116 N. Y., 167.
New Orleans Gas Company vs. Louisville Light Co.
115 U. S., 650.
Matter of the City of Brooklyn,
143 N. Y., 596, affd. 166 U. S., 685.
Warsaw Water Co. vs. Village of Warsaw,
16 App. Div., 161 N. Y., 502.
Louisville Gas Company vs. Citizens' Gas Company,
115 U. S., 683.
Fort Plain Bridge vs. Smith, 30 N Y 44
Hamilton Gas Co v Hamilton 146 N Y 268

~~30 N. Y., 44.~~

Colby University vs. Village of Canandaigua,
69 Fed. Rep., 671.

Auburn vs. Douglass,
9 N. Y., 444.

The plaintiff in error, however, contends that although the defendant village might grant a similar franchise to another water corporation, it has no right to construct or maintain a system of its own. An exclusive right to supply water to a town is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply a privilege of laying its mains in the street, with a covenant for the payment of hydrant rentals, without any words of exclusion.

The *franchise*, in this case consists of a resolution adopted by the village granting the application of certain persons to allow a corporation, to be formed by them, to supply the village and its inhabitants with pure and wholesome water, pursuant to the provisions of the Water Companies Act, upon the conditions, among others, that said corporation shall not charge or collect from said village, at any time, a greater sum than $40 per annum for each hydrant furnished for the use of said village, and at that rate shall furnish all hydrants required by said village, at such places as shall be designated by its trustees.

The only contract contained in reference to the supply of water, is, that the plaintiff shall furnish water to the village and its inhabitants, *when requested* to do so, and is, in that respect, precisely the same as the Syracuse Water case.

It was held that in the Syracuse Water case that it was not to be implied from such an obligation on the part of the water company, that the municipality was required to *take water* necessary for its uses from the water company alone, and to *refrain* from obtaining it from any other source.

It has been repeatedly held in cases of franchises granted by municipalities, that no obligation is to be *implied* on the part of the *grantor* on account of the obligation *imposed* by its term upon the *grantee*. That although the grantee may be *obliged*, when requested by the grantor, to *perform* certain acts, that there is no corresponding obligation that the *grantor* shall *request* the performance of such acts by the grantee, and shall not *perform* the same himself, or *resort* to other parties.

Where a simple franchise is granted, the only acts which the grantor promises *not* to perform are those which *prevent* the exercise of the franchise by the grantee. Acts which may impair its value, and even lessen the same so much that the privileges become almost worthless, performed by the grantor, or another corporation to whom it has given similar rights, are not *repugnant* to the grant. In case of an *exclusive* franchise, the giving of similar privileges to another corporation, or the exercise of the same powers by the grantor, would be so. This is the distinction between a simple and exclusive franchise.

The only right given to the plaintiff by the resolution of the village in this case is the right to supply the village and its inhabitants with water *when requested*. By establishing works of their own they have not *prevented* plaintiff from doing so. There is no implied obligation on the part of the village to *take water*

from the plaintiff corporation any more than on the part of its inhabitants to do so. The village no more violates its franchise by establishing works of its own, than by failing to *request* the plaintiff to furnish water.

In the case of Colby University against the Village of Canandaigua, in which Judge Coxe wrote an elaborate opinion, the water corporation was formed under the general law, and acquired substantially the same rights as the plaintiff, by the resolution of the village granting the application and allowing the use of its streets.

A. IF THE FRANCHISE IN THIS CASE CONTAINS A CONTRACT ON THE PART OF THE VILLAGE TO TAKE WATER FOR ITS OWN USE IN PERPETUITY FROM THE PLAINTIFF, AND NOT TO BUILD WORKS OF ITS OWN, IT IS VOID BECAUSE THE VILLAGE HAD NO AUTHORITY TO ENTER INTO ANY SUCH AGREEMENT.

A municipality can not, without express legislative authority, grant exclusive rights.

1. Dillon on Municipal Corporations, 4th Edition, Sec. 692—696.

State vs. Cincinnata Gas Company, 18 Ohio st., 262.

Indianapolis vs. Indianapolis Gas Co., 66 Ind., 396.

Norwich Gas Co. vs. Norwich City, 25 Conn., 19.

Nor can any municipality enter into a contract with another corporation or to exercise the powers conferred upon it by the legislature. The trustees of the village

are not vested with any such authority. Such an act is in the nature of an exclusive franchise.

A municipal corporation can bind itself by contract only so far as it is authorized to do so by statute. It cannot enter into an agreement to take water forever from a water corporation, unless authorized to do so by the legislature. It cannot curtail by contract the right to exercise the powers vested in its legislative board.

Syracuse Water Works Co. vs. The City of Syracuse.
116 N. Y., 167.

Municipal corporations have no power as a party to make contracts which shall control or embarrass their legislative powers and duties.

Mayor vs. Second Ave. R. R.,
32 N. Y., 261.

There is nothing in the statutes which prevents a state from granting to municipalities the same right to construct and operate water works that it does to private corporations. The fact that such municipality may become the more vigorous competitor, does not prevent the exercise of such rights.

POINT III.

BY THE FRANCHISE GRANTED BY THE VILLAGE TRUSTEES TO THE PLAINTIFF, AND THE SUBSEQUENT FIVE YEARS CONTRACT, THE VILLAGE DID NOT ELECT TO TAKE WATER FROM THE PLAINTIFF FOREVER, AND AGREED NOT TO ESTABLISH A PLANT OF ITS OWN.

There are some Pennsylvania cases holding under certain peculiar statutes of that state, that boroughs may either obtain a supply of water by contract, or establish works of their own, but having once elected to supply themselves by contract, the power to establish works of their own is gone. Those cases are not applicable for two reasons.

1. The statutes of the State of New York bearing on the question are totally dissimilar, and manifest an entirely different intent.

2. The *village* of Skaneateles has never elected to supply itself with water by contract.

The act of 1873, chapter 737, under which plaintiff is incorporated, by section 3, authorizes and empowers the companies organized under the act to supply the authorities, or inhabitants of villages where they are located with such rates and cost to consumers as they can agree upon. The general village law, at that time, contained no provision on the subject of water, except that the trustees were allowed to construct and maintain reservoirs and cisterns and supply them with water for the use of fires. (Chap. 291, Laws of 1870, pp, 683.) By Chap. 181, Laws of 1875, General Village Law, villages were authorized to establish works of their own, but the trustees were not empowered to contract for a water supply. To cure such want of power, Chap. 129 of the Laws of 1879, amending the village law, was enacted, which was in force when the contract in question was made. That statute amending the general village law authorized the trustees of a village to contract for a water supply, provided, however, that no such contract be made for a longer period than five years, unless the same should be

adopted by a vote of the tax payers of the village.

By Chap. 422 of the Laws of 1885, amending said act of 1873, such water corporations were *required* and *empowered* to supply water to the villages where they were organized; and the trustees of all villages were authorized to enter into contracts for their water supply with any water company organized in the State, not exceeding a period of five years without a vote of the tax payers, and for a period not exceeding thirty years, if authorized by such vote.

Sec. 81 of the General Transportation Law, Chap. 230 Laws of 1894, contains similar provisions.

The contention of the appellant is as follows:

That in the year 1889, the village was authorized to establish a water system of its own, (Chap. 181, Laws of 1875;) or the trustees of the village might enter into a contract with a water corporation for a supply of water for a period not exceeding five years, unless authorized by a vote of the tax payers (Chap. 129, Laws of 1879; Chap. 422, Laws of 1885;) that the granting by a village to a water corporation formed under the general act of the franchise to supply water, and lay mains in the village streets, which must necessarily precede a contract for a water supply for the period of five years, is an election by the village requiring it to take water for its own use from such water corporation forever, and not to establish works of its own.

This proposition seems absurd upon its face, to-wit: that an act authorizing the trustees of a village to enter into a contract with a water corporation for a supply of water for five years, and limiting them to that item, makes the franchise necessarily granted to the

water corporation before such contract can be made, a perpetual agreement to take water from the same company, and prevents the village from exercising similar rights.

It is obvious that by the provisions of the statute above cited, allowing the trustees to contract for a supply of water for a limited period only, and the village to establish works of its own, standing side by side, that the legislature could not have intended that the village should elect which system of supplying the village should be adopted, and such election should be final and conclusive on the village.

The fact that contracts are to be made for certain restricted periods of time, with or without the vote of tax payers, shows a contrary intent on the part of the legislature, and is fatal to the appellant's contention.

The provisions of Sec. 22, Chap. 181, Laws of 1875, authorizing but not *requiring*, the water commissioners of villages which may, or may not have established water systems of their own, to condemn at any time the plant of existing water corporations, are also inconsistent with the Pennsylvania theory of election, and shows that it was the intent of the legislature of this State that villages should be allowed to contract for a water supply, or supply themselves and change from one system to the other at any time they saw fit. These views are also confirmed by the general village law, (Chap. 414, Laws of 1897,) passed since the commencement of this action, and repealing chapter 181 of the Laws of 1875, and chapter 129 of the Laws of 1879. By section 229 of the new law, the trustees of villages are authorized to enter into contracts with any corporation, or individual, for a water supply for lim-

ited periods, as provided in prior acts.

Sec. 230 reads as follows:

> "A proposition may be submitted at a village "election for the establishment of a system of wa- "ter works for supplying the village and its inha- "bitants with water, or for the acquisition of an "existing private system, and at an expense in "either case not exceeding the sum stated in the "proposition."

This seems definitely to settle the question, for the legislature has expressly given the electors of a village where there is an existing private system, the right to determine by vote whether such system shall be condemned, or the village shall establish works of its own. There is no existing private water corporation doing business in any village in this state, which has not been granted a franchise, which requires it to supply water to the village and its inhabitants, either by its special act of incorporation, or by resolution of the village in pursuance of the general water act.

If our statutes can be construed in the same manner as the Pennsylvania statutes, it must be that a contract made by the *village* in pursuance of the vote of its *tax payers* shall have the effect to constitute an election on the part of the village, and not a franchise granted by its trustees. It seems absurd to say that the trustees of a village by granting the application of a water corporation to supply the village and its inhabitants with water, can elect from the village that it shall take water from that corporation forever, and shall not establish works of its own. The trustees have no power to bind the village in that regard.

In the case of White vs. the City of Meadville, 117 Pa.,

643, it appears that after the electors had voted that the borough should not establish works of their own, the trustees made a contract with the plaintiff. In that case the directors had indirectly sanctioned the supply by contract.

In the case of Metzger, 178 Pa. St., 1, it does not appear whether there had been any vote of the electors or not.

The village in this case has never elected to adopt the course of supplying itself with water by contract, and the trustees have no power to bind the village in that regard without a previous vote of the tax payers. The evidence shows that the only contract made between the plaintiff and the village was made by the trustees directly against the wishes of the tax payers, and that they endeavored to prevent its execution.

Therefore the Court below held that the franchise here acquired was not exclusive, and did not prevent the village from proceeding under the acts of 1873, and the acts amendatory thereof and that the plaintiff conceded the same.

POINT IV.

CHAPTER 181 OF THE LAWS OF 1875 IS NOT UNCONSTITUTIONAL UPON THE GROUND THAT IT IS A LAW IMPAIRING THE OBLIGATION OF A CONTRACT.

The counsel claimed in the Court below that the act under which plaintiff was incorporated (being chapter 737 of the laws of 1873 as amended by chapter 422 of the laws of 1875) required water companies formed thereunder to supply water to the villages, in

which they were organized, and to their inhabitants, and provided that application might be made by the persons about to form such a corporation for leave to furnish such water supply, and upon the granting of such application, a corresponding obligation arose upon the part of the village, to take water for its own use, forever from the corporation organized pursuant thereto.

The Courts have held over and over again, that no such obligation is to be implied upon the part of the municipality. It is immaterial whether the contract on the part of the water Company is contained in its special charter, as in the Warsaw case, decided with this in the Court below, and the Syracuse case, under which it is incorporated.

The village grants the franchise to supply water, when it grants the application of persons about to form a corporation for that purpose.

This case cannot be distinguished from the case of Colby University against the Village of Canandaigua. In the Canandaigua case, the water corporation was formed under the act of 1873, and after the application of its incorporators to supply water had been granted by the village as required by that act.

Although the act of 1873, previous to the amendment of 1885, authorized and empowered, but did not require the company formed thereunder to supply water to the village where it was organized, no doubt such obligation arose on the part of the water company from the granting of the application made to supply water to the village and its inhabitants. The amendment of 1885 to the act of 1873 did not therefore impose any new obligation in that regard upon

the water Company.

It was not the design of the Legislature by chapter 422, of the laws of 1885 to impose upon the village, by the granting of the application, any obligation to take water from the Water Company organized thereunder in perpetuity because in the same clause of the act it is provided, that the trustees of the village may enter into a contract to take water from such corporations for a limited period only.

Nor does the resolution adopted by the village create any contract on its part to take water for its own use. It recites, that the application to supply water under such act is granted upon the condition that the Company shall not charge a greater sum than $40 per annum for each hydrant furnished and shall furnish all hydrants required by the village, and restore the streets where pipes are laid to their former condition.

These conditions attached to the grant did not enlarge plaintiff's rights, and at the most, only obliged the plaintiff to furnish water to the village when requested by it to do so.

Previous to 1875 villages had no power to supply themselves with water by contract, or establish works of their own. The general village law of 1870, Chap. 291, did not give them such power. Chap. 737, of the laws of 1873, gave water companies the power to supply water, but did not give villages the right to contract for such water supply, when they had not already such powers. Villages were given this power by Chap. 181 of the laws of 1875. Section 7 was added by Chap. 129 of the laws of 1879, and provided that the village trustees should have power to enter into contracts for a supply of water for limited periods

only. Then for the first time villages were authorized to contract with Water Companies for water supply by the legislature. By Chap. 422, of the laws of 1885, amending chapter 737 of the laws of 1873, the trustees of the village were authorized to enter into contracts, with any water corporation in the State. By chapter 678 of the laws of 1896, these provisions were made a part of the Transportation Corporation Law.

The defendant village has not delegated to the plaintiff corporation its whole power to supply itself and its inhabitants with water, nor has it covenanted not to exercise such rights itself, nor has it deprived the plaintiff of its power to supply water to the village and its inhabitants.

The granting of a franchise by a municipality to a corporation to do certain things that a municipality might itself do, is not a delegation of *all* the power of the municipality in the matter, but only to the *extent* of the grant. Thus a franchise to supply water to a village and its inhabitants *when requested*, does not prevent the granting of a similar franchise to another corporation. For the same reason a municipality can establish works of its own. It has only delegated to the corporation the right to supply the village and its inhabitants with water when *requested* by them to do so. The village or its inhabitants, may fail, or determine not to make such request. The establishment of works of its own by the village is such an act, which the village has a right to perform. The construction and operation of a water system by the village does not deprive the plaintiff of its *power* to perform its franchise, or of anything essential to the enjoyment thereof. The village, if it see fit, may still take water of the plaintiff, and its inhabitants may do so. As

the franchise is only to supply such water as the village shall *request*, the plaintiff is not prevented from supplying the village by the establishment of works of its own, but by the failure of the village to *request* it to furnish water.

The plaintiff would be *prevented* in the same manner from performing its franchise by the granting of a similar franchise to another corporation, and the taking of water from such corporation. The plaintiff would thus be deprived of the village as a customer. This precise question was passed upon in the Syracuse Water case, and in this case in the Court below.

The fact that the village may prove the more favored competitor, or that the competition may not be upon equal terms, does not deprive the plaintiff of the *power* to compete, but only impairs the *value* of its franchise. Many reasons exist why this might be so. The source of supply may be better, the municipality is not required to pay dividends, but only interest upon its bonds, its credit is better, and the rate of interest paid on loans necessary to build the works is lower. It can furnish water at lower rates.

If the act under which plaintiff is incorporated, and the granting of the application by the village constitutes a contract on the part of the village to take water for its own use from the plaintiff, the act of 1875 does not impair that contract. Notwithstanding the village has constructed works of its own, it may take water from the plaintiff, and if it refuses to do so, the plaintiff has a remedy at law by right of action for damages, and is not entitled to maintain this action.

If, on the other hand, as we claim, no such obligation exists, then there is no contract which the act has

impaired.

There is nothing in Chap. 181 of the laws of 1875, which by force of *law* prevents competition on equal terms between the plaintiff and the village, or deprives the plaintiff of the *power* to compete.

Section 18 of such act provides that the water commissioners may borrow money upon the bonds of the village and appropriate the moneys so obtained to supplying the village with water. Section 15 provides that the net annual receipts from water rents shall be applied to the payment of interest on the bonds and the creation of a sinking fund for the payment of principal. Section 16 provides, that in case the net annual receipts in any year shall prove insufficient to pay the interest and any principal falling due in that year, not paid from the sinking fund, such deficiency may be levied and assessed on the taxable property of the village, the same as other taxes.

It cannot be said as a matter of *law*, or of *fact*, that the inhabitants of the village would be prevented by these provisions of taxation from taking water from the plaintiff corporation, and that they destroy, or even impair, the *power* of the corporation to exercise its franchise so far as the inhabitants are concerned. It is not probable that the net water receipts will not pay the annual interest on the bonds, amounting to $1,500, or that the plaintiff corporation will have to be taxed for the payment of such interest and principal, and there is no evidence that any taxes have been, or will be, levied upon the plaintiff's property on account thereof.

The village also contends that since the granting of plaintiff's franchise, the above section 16 of the general

village law has been amended by Chap. 284 of the Laws of 1894. This act, as well as Chap. 181 of the laws of 1875 has been repealed by the general village law, Chap. 414 of the laws of 1897.

Section 230, however, of the last mentioned law provides as follows:

"A building, and the lot upon which the same stands, in or on which water from the water works is not used, situated within five hundred feet of a hydrant *may* be assessed by the Board of Water Commissioners for fire protection."

If we assume that assessments under that section would cause the customers of the plaintiff to take water from the village, it does not render the prior act of 1875 unconstitutional. It is optional with the water commissioners to make such assessment and it has not been done. If such provision of the act of 1897 impairs the obligation of a contract, the plaintiff has its remedy by a suit to restrain the levying of such tax upon itself, and the other inhabitants of the village not using the water supplied by the village.

It cannot be said, therefore, that the act of 1875 is unconstitutional, because it impairs the obligation of a contract.

The city of Syracuse, under its charter had no power to erect water works of its own, and levy taxes for the building and maintenance of the same at the time of the action brought by the Syracuse Water Company. The power to do so was given by Chap. 291 of the laws of 1889, passed after the decision of the Syracuse water case.

If section 230 of Chap. 414 of the laws of 1897 has the indirect effect of injuring or destroying the plain-

tiff's franchise or its power of competing, by depriving it of its customers, or is unjust and inequitable, the remedy of the plaintiff is not with the Courts but with the Legislature.

People vs. Mayor,

4 N. Y., 419.

POINT V.

CHAPTER 181 OF THE LAWS OF 1875, IS NOT UNCONSTITUTIONAL UPON THE GROUNDS THAT IT AUTHORIZES THE TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE WITHOUT COMPENSATION, OR THAT IT DEPRIVES THE PLAINTIFF OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The applicant's contention is that the village is authorized to construct a plant by taxation and levy taxes upon all the property of the village for that purpose, including the property of the plaintiff corporation, and that such assessment upon the property of the plaintiff is a taking of private property without any compensation whatever, and a taking of the property of the plaintiff, without due process of law.

As before argued, under the act of 1875, the village is authorized to borrow money to construct its water works, and if the net water receipts are not sufficient to pay interest and principal, to levy taxes therefor. As a matter of fact, loans are made by the village for the purpose of constructing the works, and if the principal of such loans is not paid from the receipts, the debt is renewed and extended. There is no evidence

in the case that the defendant village has ever levied any taxes upon the property of the plaintiff on account of the construction and maintenance of the water works under the law of 1875, or that it is probable that it will ever be obliged to do so. The receipts will be sufficient to pay interest and expenses.

Hendryan v Hinsler in 173 N.Y. 372

A. If the provision of Chap. 181, authorizing the property of the plaintiff to be taxed for the maintenance and operation of water works established by the village is unconstitutional, the rest of the act still remains valid.

If such tax should be levied upon the property of the plaintiff, it would have the right, if the provision in question is unconstitutional, to maintain an action to restrain the assessment and collection of such tax.

B. The assessment against the property of the plaintiff, authorized by said Chap. 181, is an exercise of the power of taxation vested in the state government. Private property may be taken for public use by taxation, and the tax payer receives, or is supposed to receive, just compensation in the benefits conferred by government, and in the proper application of the tax.

The remedy against unwise or unjust modes of taxation is to be sought from the legislature department of the government, and not from the judiciary.

People vs. Mayor,

4 N. Y., 419.

Absolute equality in laying the burdens of taxation, as shown by experience, is impossible of attainment, and is not an insuperable object to a law that it does not accomplish that result. In the consideration of the effect and meaning of laws imposing taxes, it would undoubtedly be the duty of the court

to so construe them, if possible, as to avoid unequal and double taxation, but in determining the question of legislative power we are precluded from entertaining such considerations, and must be governed by the constitutional authority conferred upon the legislative body. In performing the duty of levying taxes for the support of the government, State legislatures may, in the exercise of their undoubted power, impose double taxes or lay burdens beyond the financial capacity of the classes taxed, and however impolitic or unwise such a course would be, the courts have no right to interfere with the exercise of the legislative discretion.

People vs. Home Insurance Co.,

92 N. Y., 347.

A gas corporation may receive no benefit from a tax to support a water system. Yet the law authorizing such tax, is not unconstitutional.

It is only where a tax law transcends the legislative power that the courts can interfere.

People vs. Commissioner of taxes,

104 N. Y., 250.

The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded.

In the Matter of Van Antwerp,

56 N. Y., 265.

The two clauses of the Constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation,

have no application to the exercise of the taxing power.

People vs. Lawrence,

41 N. Y., 140.

Howell vs. City of Buffalo,

37 N. Y., 270.

It is a part of the legitimate exercise of the state power of taxation to ascertain, subject to no judicial review, the public burdens to be borne, and the persons or classes of persons who are to bear them.

Brewster vs. City of Syracuse,

19 N. Y., 118.

The plaintiff has quoted language used in the following cases in his brief, but in none of them was the property of the plaintiff claimed to have been taken by taxation, except in the case of Davidson vs. New Orleans, and in that case the assessment was held valid.

In re Jacobs, 98 N. Y., 98, a law prohibiting the manufacture of cigars in tenement houses in certain cases was held unconstitutional.

In People vs. Otis, 90 N. Y., 481, it was held that an act discharging the City of Yonkers from liability upon certain negotiable bonds issued by it upon the delivery by it of certain duplicate bonds to the Manhattan Savings Institution, was unconstitutional.

The quotation of appellant from Davidson vs. New Orleans, 96 U. S., 97, is from the opinion of Justice Bradley. The opinion of the court was delivered by Justice Miller, who said a law may violate some provisions of the state constitution against unequal taxation; but

the federal constitution imposes no restraints upon the state in that regard.

In Pompeyly vs. Green Bay Co., 13 Wall, 66, an action of trespass on the case was brought for over flowing the plaintiff's land, and the defendant justified under an act of the legislature authorizing the construction of a dam, which was held void.

C. If the provisions in the act of 1875, authorizing the taxation of the property of the plaintiff is unconstitutional for any reason, the rest of the act is not rendered void thereby.

The plaintiff can obtain all the relief to which it is entitled by an action to relieve itself from such assessment, and restraining the same, if such an assessment should be made.

D. Section 230, Chap. 414, of the Laws of 1897, passed after the commencement of this action, does not render Chap. 181, of the Laws of 1875, unconstitutional.

If such an act is not a proper exercise of the legislative power in regard to taxation, and is void as a taking of the property of the plaintiff without just compensation, or due process of law, the other provisions of the act authorizing the establishment of works of the village are not rendered unconstitutional thereby. Still less is the previous act of 1875 rendered void.

The theory of the appellant is that said section 230 is unconstitutional, because it taxes persons owning buildings in the vicinity of hydrants for protection for fire purposes, if they do not use the water furnished by the village. This is the only one of the acts referred to which could have any tendency towards preventing the present customers of the plaintiff corpora-

tion from ceasing to take water supplied by it, and taking the water furnished by the village. The water commissioners are not *required* to make such assessment, and may see fit never to do so.

POINT VI.

THE VILLAGE LAW OF 1875, AND THE WATER SYSTEM ESTABLISHED BY THE DEFENDANT VILLAGE THEREUNDER, DOES NOT DIRECTLY OR INDIRECTLY TAKE AWAY, OR DESTROY, THE PROPERTY OF THE PLAINTIFF.

The plaintiff had no contract with the village, by which the latter was obliged to take the water furnished by it; the village may still request the plaintiff to supply water, if it sees fit to do so, notwithstanding the establishment of works of its own; the customers of the plaintiff are not *prevented* from taking water from the plaintiff by the construction of the plant of the village; nor is such result a necessary or probable effect of the act of 1875, and the taxation authorized thereby.

If the plaintiff loses any of its customers after the plant is established by the village, such loss cannot be attributed to the effect of any *act* passed by the legislature, unless it is section 230 of the Laws of 1897, which became a law after the commencement of this action. That section allowing assessments to be made by the water commissioners for fire protection upon all buildings, where the water furnished by the village is not used, is *permissive*, and the power given to the

water commissioners thereby may never be exercised. If that section is unconstitutional, and such power should be exercised, the commissioners might be restrained by a proper action from making such assessment either upon the plaintiff corporation, or upon its customers.

The only argument of any weight against the constitutionality of Chap. 181 of the Laws of 1875, set forth in plaintiff's brief in the Court below, is that it authorizes *taxation* of the property of the plaintiff to construct and maintain the water works established by the village, if the receipts therefrom are insufficient to do so, although it does not appear that such power will ever *necessarily* be exercised and there is no evidence that such taxes have been levied.

If, however, those provisions for taxation, or section 230 of the Laws of 1897 are unconstitutional, the remainders of the acts of 1875 and 1897, allowing the village to establish works is not rendered void thereby, as by proper action the plaintiff could restrain the collection of such taxes out of its own property, and out of the property of its customers, under the act of 1897.

As before argued, the remedy of the plaintiff of the alleged injustice is with the courts and not with the legislature.

POINT VII.

CHAPTER 181, OF THE LAWS OF 1875, DOES NOT VIOLATE THE PROVISION OF THE CONSTITUTION THAT NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JUR-

ISDICTION THE EQUAL PROTECTION OF THE LAWS.

The appellant claims that it has that effect because the village is given power to tax the private water corporation for the construction and maintenance of its plant, to condemn its property, and regulate its charges to customers.

As far as taxation is concerned, that power will probably never be exercised; it may be eliminated from the act if unconstitutional, and the remainder stand; it is not such an exercise of the taxing power of the government as will be reviewed by the courts.

The act does not give the village power to regulate plaintiff's water charges to customers.

The legislature has power to authorize the condemnation of any property for a public use.

West River Bridge Co., vs. Dix,
6 How., 507.

This includes franchises of every description, whether exclusive or not, and it is not apparent how the exercise of such power is unconstitutional upon the ground that it deprives water corporations of the equal protection of the laws.

Cooley on Constitutional Limitation,
5th edition, Sec. 341.

It is submitted that municipalities have been given power by the legislature to establish works of their own, and to engage in the *business* of supplying water to their inhabitants for their own benefit, and the benefit of the residents of the municipalities. A supply of better water is thus generally obtained for consumers, and the rates required to be paid are lower. It is

probable that the magnificent water system of Syracuse would not now be in operation, if the water company in that city had succeeded in defeating municipal ownership at the polls, as they tried to do. Exorbitant charges of the water corporation are also prevented.

The principal object of authorizing villages to establish water systems of their own undoubtedly was to enable them to engage in the water business, and to supply their inhabitants, rather than to supply themselves.

POINT

VIII.

THE SUBSEQUENT ACTS OF THE LEGISLATURE KNOWN AS CHAP. 507 OF THE LAWS OF 1889, AND CHAP. 662 OF THE LAWS OF 1893, AND CHAP. 284 OF THE LAWS OF 1894, AMENDING SAID ACT OF 1889, DO NOT RENDER THE PROVISIONS OF THE ACT OF 1875 AUTHORIZING VILLAGES TO ESTABLISH THEIR OWN WATER PLANTS UNCONSTITUTIONAL AND VOID.

These subsequent acts are *independent* acts, and do not purport to be amendments to the act of 1875, nor are they added as sections thereto. They are not incorporated with the act of 1875, so as to affect the constitutionality of its other provisions. They simply confer certain powers of taxation upon water commissioners of villages to be exercised, or *not*, as they deem fit. In villages where there is no existing water plant in competition with the municipality, the exercise of

such power is not forbidden by the constitution.

These acts do not form an ingenious device to deprive existing water corporations of their customers, but were passed to enable municipalities where there are no private plants to levy a frontage tax on all real estate benefited by the water supply. These provisions have come from the special charter of different cities and villages of the state, where water is furnished by the municipality alone, and there is no competing company.

In spite of the somewhat harsh suggestion of the Court below, that a village that would refuse to condemn an existing plant would not hesitate to impose a frontage tax to drive the competing water corporation out of existence, the village of Skaneateles has never assessed, or proposed to assess, such frontage tax. It may have been left by the legislature *discretionary* with the water commissioners to impose such tax, so that in case of villages where there were existing water corporations it should not be levied.

If the subsequent acts were unconstitutional because they dealt with a subject not contained in their title, could it be for a moment claimed that the prior act of 1875 was rendered void thereby.

A power of taxation granted by the statute which is unconstitutional, where the exercise of such power is discretionary, does not of *itself* impair the value of property subject to taxation thereby. It is only the *exercise of* such power that constitutes a taking of property for public use without just compensation, or due process of law, and when such exercise is attempted, it may be restrained in suits brought by those who would be injured thereby.

Where powers of taxation conferred upon municipal authorities by general statutes cannot be lawfully exercised in the case of a *certain* municipality because of the circumstances existing therein, but the same are easily separable from the main provisions of the act to which they are a subsequent independent enactment, and the exercise of such powers is made discretionary with such authorities, it cannot be said that a voter under the original act is influenced by his ignorance that such powers are unconstitutional. When he casts his vote, whether the provisions in question are constitutional or not, he knows the same may never be exercised, and his vote is not affected by the power, or want of power to exercise the same, when such exercise is optional.

The Court cannot assume that the elector was induced to vote for water taxes by the Law of 1894. The plaintiff must prove that such was the fact to take advantage of it.

People vs. Kinney,

96 N. Y., 294.

The point is not whether the provisions of a statute which are adjudged to be unconstitutional are contained in the same section, for the distributions of sections are purely artificial, but whether they are essentially and inseparably connected in substance. If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

Cooley on Const. Lim.,

page 178.

When part of a statute is unconstitutional that does not affect the validity of the remainder, unless the provisions are so inter-dependent that one cannot operate without the other, or are so related, in substance and object, that it is impossible to suppose that the legislature would have passed the one without the other.

If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, it must be retained and this is so although the portion to be condemned is found in the *same section* with that sought to be retained.

People vs. Kinney,

96 N. Y., 294.

The case last cited seems directly in point. In that case an act for the election of alderman in the City of New York contained a provision prohibiting the electors from voting for more than two-thirds of the whole number to be elected. An action of *quo warranto* was brought to test the title of the aldermen elected under the act, claiming that this provision was unconstitutional. The Court held that it was void for that reason, but that the aldermen were duly elected because it did not appear that any voter *claimed* the right to vote for all six aldermen, and was *denied* the right.

It would be a most dangerous doctrine to establish, that where minor provisions of an act giving certain powers to officers elected, or appointed thereunder, are unconstitutional, that the whole act is null and void.

Let us suppose for a moment that the village law had given to the village the right to establish works of

its own, or to condemn the existing plant, but that the proceedings authorized for the latter purpose were expressed in such terms as to deprive the water company of its property without due process of law, and unconstitutional for that reason, and that the water company had successfully resisted an attempt to condemn its property under the act, could the water company then maintain an action restraining the village from establishing works of its own upon the ground that the tax payers would not have voted for municipal ownership, unless they had believed that the village had power to condemn the existing plant?

The electors of the City of Syracuse voted for municipal ownership of the water system under an act, Chap. 61, Laws of 1886, which authorized condemnation proceedings against persons owning certain properties. The power to condemn their property was resisted by the owners upon the ground that the same was unconstitutional. (Case on appeal, 86 Hun. 441.) If it had been so held, could the old water company in the City of Syracuse have maintained an action restraining the establishment of water works by the city upon the ground that the electors would not have voted for municipal ownership had they not believed that the condemnation proceedings against such property authorized by the act were valid?

Whether the tax payers of the village of Skaneateles in voting that the village should establish a water system of its own were influenced in any manner by the provisions for the taxation of the property of the plaintiff in the act of 1875, and the frontage tax authorized, but not required, by subsequent acts, is purely imaginary and speculative.

In order that a minor provision of an act, under which an election is required to be held, which turns out to be unconstitutional and void may affect the remainder of the act, or the result of the election, it must at least, *affirmatively* appear that the voters were influenced by such unconstitutional provision. Where the provision is wholly minor to the main purpose of the act and easily separable therefrom, the other provisions of the law are not rendered unconstitutional, even though evidence was given that such unconstitutional provision influenced *some* of the votes cast at the election.

POINT IX.

SECTION 22, OF CHAPTER 181, OF THE LAWS OF 1875, DOES NOT REQUIRE THE VILLAGE TO ACQUIRE THE PROPERTY OF A WATER CORPORATION EXISTING THEREIN, BEFORE ESTABLISHING A PLANT OF ITS OWN, OR EVIDENCE AN INTENT ON THE PART OF THE LEGISLATURE THAT A VILLAGE WHICH HAS GRANTED A FRANCHISE TO A WATER CORPORATION SHALL BE HELD TO HAVE ELECTED TO TAKE WATER FROM THAT CORPORATION FOREVER.

The act authorizes condemnation of *property* and franchises, and the commissioners might very properly determine it was necessary to acquire the existing plant rather than tear up the streets again, irrespective

of any franchise the water corporation might have. The word "necessary" in this act was intended to have the same signification as the word "desirable."

But if appellant's construction of that section be correct, it does not follow that the legislature thereby recognized, or contemplated, that the property of water corporations, holding franchises like the plaintiff, must be condemned before the village could construct works of its own, but only that where there were corporations holding exclusive rights, or claiming to do so, the commissioners might condemn the same if they thought it was *necessary* or *desirable*.

Sections 221 and 222 of the present village law (Chap. 414 of the Laws of 1897) shows that such intent of the legislature, deduced by the appellant from the act of 1875, does not exist, because the water commissioners of the village are *now* authorized to construct works, or condemn the property of an existing private system, without any restrictions, when authorized by a vote of the electors. The legislature has evidently *ceased* to recognize the pretended rights claimed by the appellant.

The appellant further contends that the power to establish water works of their own was conferred upon villages to enable them to perform a public duty, and not to carry on business at a profit.

The greater part of the public duty, however, was to furnish to consumers a better supply of water, and at lower rates than has been done by private corporations.

The woes of water corporations have not arisen from socialistic ideas, or the rapacity of tax payers, but from the insufficient manner in which they have exer-

cised the powers conferred by their franchises, the exorbitant demands made for water, and the greed of their officers and stockholders.

Thus in the Syracuse case it was poor water and demand for the payment by the city of double the amount previously paid annually, which caused the action of the city. In the Warsaw and Canandaigua cases, it was the poor supply of water furnished. In the present case it was the *illegal* and *exorbitant* demands of the corporation.

It is certainly a new idea that a gas, or water company who invariably give as little as they can, and charge as much as they dare, are entitled to be treated with all the favors of purely charitable corporations. It is the general belief that municipalities are constantly suffering at the hands of corporations to whom they have given franchises without sufficient restrictions, and prominent among such corporations are gas and water companies, street and steam railways.

The suggestions scattered through appellant's brief that the water corporation has built up a demand for water and created a water business which did not before exist, apply with equal force to a franchise granted to another corporation. It cannot be said that the defendant village in this case takes the property, business or franchise of the plaintiff. It only becomes a competitor. The only objection to that suggestion is that the taxation authorized by Sec. 230 of the Laws of 1897, has the indirect effect to destroy competition, all former laws on the subject being repealed by that act. That section may be declared unconstitutional and void, if it is a violation of the exercise of the power of taxation vested in the legislature without affect-

ing the act of 1875.

POINT X.

CHAPTER 369, OF THE LAWS OF 1889, IS FURTHER EVIDENCE THAT IT WAS NOT THE INTENTION OF THE LEGISLATURE THAT VILLAGES BY GRANTING APPLICATIONS TO SUPPLY WATER TO CORPORATIONS UNDER THE WATER COMPANIES LAW SHOULD BE HELD TO HAVE BOUND THEMSELVES TO TAKE WATER FROM SUCH CORPORATION FOREVER.

That act amends Chap. 737, of the Laws of 1873, authorizing the formation of water companies, and subsequent acts supplementary thereof.

It provides that it shall be the duty of corporations formed under that act to supply villages where they are organized and their inhabitants with water, when *requested* to do so.

POINT XI.

THE CONTRACT MADE BY THE TRUSTEES OF THE VILLAGE IN 1889 FOR A SUPPLY OF WATER WAS ILLEGAL AND NO RIGHT COULD BE ACQUIRED BY THE PLAINTIFF THEREUNDER.

In the Pennsylvania cases, it was held that the election of the village was determined by the *contract*,

and not by the previous *franchise*.

At the time this contract was made, the only power the trustees had was by virtue of Chap. 129, of the Laws of 1879, authorizing the trustees of a village to contract with any water company for supplying the village with water for the purpose of extinguishing fires, and providing that no such contract should be made for a longer period than five years, nor for a sum exceeding in the aggregate fifty cents per capita per annum of the population of the village, unless the proposition for the same be submitted at an annual election, or special election, to a vote of the citizens authorized to vote on questions of taxation, and approved by a majority of the same.

The contract entered into between the plaintiff and trustees required the village to pay thirty dollars per annum for forty hydrants, or $1,200 a year (fol. 398.) There was no vote authorizing the contract, but on the contrary a large number of the tax payers remonstrated against it. At that time the Village of Skaneateles contained less than 2000 inhabitants and only a contract for $1,000 or less was legal (fol. 522.) The population of the Village of Skaneateles in 1880 was 1669, and in 1890 only 1559 (Red Book, 1898, page 522.) This census was not put in evidence, but the court may take judicial notice of the population of political divisions of the state.

Mertz vs. City of Brooklyn,
33 St. Rep., 577, not reported elsewhere.

The trustees therefore made a contract requiring the village to pay nearly double the amount they were allowed to do by law. The plaintiff could acquire no equitable rights from any implied obligation resulting

from this contract.

It is claimed by the appellant that the trustees were given the power to make the contract made by them, by Chap. 422, of the Laws of 1885, but effect may be given to that law and leave the act of 1879 in force.

Sutherland on Statutory Cons.,

Section 152.

In the Matter of the Evergreens,

47 N. Y., 216.

That it was not the intention by chapter 422 of the Laws of 1885 to give further powers to the trustees of villages incorporated under the general village law, is evidenced by Chap. 978 of the Laws of 1896, substantially re-enacting Chap. 129 of the Laws of 1879, and repealing all acts inconsistent therewith.

POINT

XII.

THE PLAINTIFF IS NOT ENTITLED TO TAKE WATER FROM SKANEATELES LAKE!

If such is the case this action cannot be maintained on the ground that the defendants have in any manner violated plaintiff's legal rights.

By plaintiff's franchise they are required to supply water from the lake. By the act under which they are incorporated they are *forbidden* to do so. Chap. 737, of the Laws of 1873, Sec. 3, authorizes the companies therein to have, hold and occupy any of the waters of the State, provided that said companies shall have no power to take or use water from any of the canals of this State, or any canal reservoirs *as* feeders,

or any streams which have been taken by the State for the purpose of supplying the canals with water. It is quite evident that the words "as feeders" should read "or feeders," and that the intention of the legislature was to prevent corporations formed under that act from taking any water from a reservoir, *or feeder* of the canal.

The plaintiff produced no authority for its right to take water except a license of the Superintendent of Public Works, which was granted without consideration and is by its terms revocable at any time.

It is submitted that this is not sufficient, as it affirmatively appears in the case, that there was no resolution of the canal board authorizing the granting of such license.

Folio 295.

Skaneateles Lake is a reservoir or feeder of the canal.

Folios 164—188.

That a statute, which is unconstitutional so far as it purports to operate retrospectively, may be upheld as to future cases, is settled by authority.

People vs. O'Neil,

109 N. Y., 251.

Cooley Const. Lim.,

180.

162 N. Y., 48.

The Court says in that case at page 49: "The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of

such grant, the legislature might require the company to transport passengers at any prescribed rate of fare; * * * * * This unlimited right of the State to charge, or to authorize others to charge toll, freight or fare for transportation on its roads, canals, &c., arises from the simple fact that they are its own works, or constructed under its authority: it gives them being."

The same rule applies to a water company, they are the creature of the legislature, and when this body passes a law which directly or indirectly changes or modifies its powers, it cannot be said that a company organized after the passage of these acts, even though they impair the obligation of a company organized prior to the passage, that a company organized after its passage has a right to assail its validity.

162 N. Y., 49.

110 N. Y., 548 N. G.

72 N. Y., 216 N. G.

The Court says in People vs. O'Neil, 109 N. Y., 262: "If it was a law governing future cases only, and even if it purported to enact a rule applicable to past as well as future transactions, it would be void as to the former only. The cases are separable, and it is not the rule that the whole statute falls because one part is unconstitutional and void, unless the void part is so interwoven with the valid part that the parts cannot be separated and the valid part sustained by itself, without defeating the intention of the legislature."

This is precisely the rule held by the Court below in this case; we have here the Court holding that the

frontage tax was unconstitutional, and taking that out, we have remaining what was the law prior to the organization of the plaintiff, and under the law as laid down in the cases cited the plaintiff cannot assail the same.

POINT XIII.

THE PLAINTIFF IS NOT ENTITLED TO ANY RELIEF, BECAUSE IT WAS INCORPORATED LONG AFTER THE VILLAGE LAW OF 1875 WAS ADOPTED.

The plaintiff claims relief of a Court of Equity on the grounds that by reason of the competition arising from the establishment of water works by the village, that said act of 1875, Chapter 181, is unconstitutional, because it authorizes the taking of private property for public use without just compensation; because it violates that provision of the constitution which declares that no person shall be deprived of property without due process of law; because it denies to a person within its jurisdiction the equal protection of the laws.

The plaintiff is not a natural person, but a corporation created in the year 1887 under the Water Company's Act, being Chapter 737 of the Laws of 1873. By said chapter 181 of the Laws of 1875, villages were authorized to establish water works of their own, or condemn existing plants. By chapter 129 of the Laws of 1879, amending said chapter 181, the trustees of a village were authorized to contract for a water supply

(with any water company,) provided said contract should not be made for a longer period than five years, unless approved by a majority of the persons entitled to vote on such questions. By chapter 422 of the Laws of 1885, amending the Water Company's Act of 1873, corporations formed thereunder were required and empowered to supply water to villages where they were organized, and it was provided that the Board of Trustees of a village might enter into a contract for a supply of water with such corporation for a period not exceeding five years, unless approved by the electors of the village.

All these acts were in existence at the time the plaintiff corporation was formed, and it asked for and obtained its franchise subject to the provisions of these acts.

A statute is not unconstitutional because it authorizes the taking of private property without just compensation, or deprives a person of property without due process of law, when the person is a corporation created after the statute is passed, and the only effect of the statute is to create a *competitor* in the business to be conducted by the corporation.

If it should be conceded that the act of 1875, for the reasons suggested by the plaintiff, was unconstitutional as to corporations *existing* at the time of its passage, it does not have that effect as to a corporation organized *after* such law was enacted.

Ashley v Ryan 153 U.S. 443 — *109 N. Y., 251.*
162 N. Y., 48.

A statute cannot be said to be unconstitutional because by virtue thereof private property is taken with-

out just compensation when the corporation is created after the passage of such statute, nor can a corporation be considered to be deprived of property without due process of law when the statute was in existence at the time that the corporation was formed. For the same reason, it cannot be said that the statute denies to a person within its jurisdiction the equal protection of the laws.

The parties interested were not obliged to form the corporation in question. When they did so, they organized subject to the limitations prescribed by the various statutes of this state and the privileges and powers granted thereby, and any competition in its business that might arise under and by virtue of such statutes. The act of 1875, and the subsequent acts granting powers to villages to establish works of their own, may be considered as amendments to the Water Company's Act of 1873. Whatever effect such amendments might have as to a corporation formed before the passage thereof, they cannot be said to violate any constitutional provisions as to corporations formed after their passage.

The plaintiff could not form a corporation under the Water Company's Act, and then say that some prior statute deprived him of property, which it had acquired subsequent to the passage of such statute.

The parties interested were not obliged to form the water corporation in question. When they chose to do so, they became subject to the provisions of law that the village might, if it saw fit, establish works of its own.

The sole ground upon which it is claimed the constitutional provisions in question have been violated

is, that *previous* to the time the corporation was formed, an act had been passed authorizing villages to enter into competition with companies formed under the act of 1873. When the plaintiff corporation was organized, it entered on its business subject to this contingency authorized by statute, and it was one of the risks of the speculation entered into for the purpose of making money. It was a risk of the trade which they voluntarily took and assumed.

This point, through inadvertence, was not presented to the Court of Appeals.

POINT

XIV.

THE PROVISION FOR POSSIBLE TAXATION OF THE PROPERTY OF THE EXISTING WATER CORPORATION CONTAINED IN CHAPTER 181 OF THE LAWS OF 1875 DO NOT RENDER UNCONSTITUTIONAL THAT PORTION OF THE ACT AUTHORIZING A VILLAGE TO ESTABLISH WATER WORKS OF ITS OWN.

They cannot be held to have that effect upon the *imaginary theory*, "that they form a weapon which is a standing menace impairing the value of the property of the plaintiff subjected to it." It cannot be said with any show of reason that the plaintiff will ever lose a customer, or fail to acquire one, on account thereof. Nor can it be said that a provision of law, which is unconstitutional, and cannot be enforced for that reason, *impairs* the value of the property affected thereby. The right granted to the village to establish works of its own, decided by the Court below in its favor, the

alleged illegality of which the plaintiff does not claim has been overlooked by the Court, is equally a continuing menace *impairing* the value of the plaintiffs' property.

An act is not unconstitutional because it may have the effect to impair the value of *property*, if the powers granted thereby should ever be *exercised*, but only where it impairs the obligation of a *contract*, *takes property* for public use without just compensation, or *deprives* a party of property without due process of law, etc. Thus, where a franchise is granted by a state to one corporation, the granting of a similar franchise to another corporation in the same locality necessarily impairs the *value* of the property of the first corporation, and it is a standing menace to its prosperity. And it is not perceptible how that *power* to tax property, which never has been, or is likely to be exercised, can impair its value or deprive a party of his property without due process of law.

It cannot be held as a matter of law, or fact, that any tax-payer of the Village of Skaneateles has been, or would probably be influenced in casting his vote by the fact, that under the act of 1875, in case of a deficiency in the sums received by the village for water, the amount of the same might be assessed against the plaintiff, as well as other parties owning real estate in the village.

There is no evidence in the case that any voter was so influenced.

The burden of proof is upon the plaintiff. The Court must assume that the unconstitutional provisions of

the act have not affected the result of the election, unless such proof is made.

People vs. Kinney,

96 N. Y., 294.

People ex rel. Fowler vs. Bull,

46 N. Y., 57.

People ex rel. City of Rochester vs. Briggs,

50 id., 553.

Commonwealth vs. Kimball,

24 Pick., 362.

Maize vs. the State,

4 Ind., 342.

Willard vs. People,

4 Scam. (Ill.) 461.

Mayor, etc. vs. Dechert,

32 Md., 369.

The assessment of taxes upon the property of the water corporation for general purposes, while all the property of the village, including its water plant, remains exempt therefrom, is not a taking of the property of the plaintiff without just compensation, or due process of law, nor is it a denial to the plaintiff of the equal protection of the laws.

People vs. Mayor,

4 Com., 419, 424.

People vs. Lawrence,

41 N. Y., 140.

The act of 1875 does not of itself direct the imposition of any tax upon the property of the plaintiff, but only provides that under certain contingencies such

tax shall be assessed. Until they *arise* and such tax is *assessed*, the plaintiff is not entitled to relief upon the ground that the provisions of the act authorizing a tax upon its property are unconstitutional. If such tax is actually levied under the law of 1875, or 1894, the plaintiff is not entitled to an injunction restraining the defendant village from establishing its water works, but only to an injunction restraining the collection of the tax from its property, and perhaps under the law of 1894, restraining the collection of the tax from the property of any of the individuals assessed thereunder. This precise question was decided in the Warsaw case, argued with this case in the Court below.

161 N. Y., 176.

POINT XV.

THE SUBSEQUENT ACTS OF THE LEGISLATURE KNOWN AS CHAP. 507 OF THE LAWS OF 1899, AND CHAP. 662 OF THE LAWS OF 1893, AND CHAP. 284 OF THE LAWS OF 1894, AMENDING SAID ACT OF 1889, DO NOT RENDER THE PROVISIONS OF THE ACT OF 1875 AUTHORIZING VILLAGES TO ESTABLISH THEIR OWN WATER PLANTS UNCONSTITUTIONAL AND VOID.

These subsequent acts are *independent* acts, and do not purport to be amendments to the act of 1875, nor are they added as sections thereto. They are not incorporated with the acts of 1875, so as to affect the constitutionality of its other provisions. They simply confer certain powers of taxation upon water commissioners of villages to be exercised, or *not*, as they deem fit.

In villages where there is no existing water plant in competition with the municipality, the exercise of such power is not forbidden by the constitution.

These acts do not form an ingenious device to deprive existing water corporations of their customers, but were passed to enable municipalities where there are no private plants to levy a frontage tax on all the real estate benefited by the water supply. These provisions have come from the special charters of different cities and villages of the state, where water is furnished by the municipality alone, and there is no competing company.

In spite of the somewhat harsh suggestion of the Court, that a village that would refuse to condemn an existing plant would not hesitate to impose a frontage tax to drive the competing water corporation out of existence, the village of Skaneateles has never assessed, or proposed to assess, such frontage tax. It may have been left by the legislature *discretionary* with the water commissioners to impose such tax, so that in case of villages where there were existing water corporations it should not be levied.

If the subsequent acts were unconstitutional because they dealt with a subject not contained in their title, could it be for a moment claimed that the prior act of 1875 was rendered void thereby?

As stated under the foregoing point, a power of taxation granted by a statute which is unconstitutional, where the exercise of such power is discretionary, does not of *itself* impair the value of property subject to taxation thereby. It is only the *exercise* of such power that constitutes a taking of property for public use without just compensation, or due process of law, and when such exercise is attempted, it may be restrained in suits

brought by those who would be injured thereby.

Where powers of taxation conferred upon municipal authorities by general statutes cannot be lawfully exercised in the case of a *certain* municipality because of the circumstances existing therein, but the same are easily separable from the main provisions of the act to which they are a subsequent independent enactment, and the exercise of such powers is made discretionary with such authorities, it can not be said that a voter under the original act is influenced by his ignorance that such powers are unconstitutional. When he casts his vote, whether the provisions in question are constitutional or not, he knows the same may never be exercised, and his vote is not affected by the power, or want of power to exercise the same, when such exercise is optional.

The Court cannot assume that the elector was induced to vote for water taxes by the Law of 1894. The plaintiff must prove that such was the fact to take advantage of it.

People vs. Kinney,

96 N. Y., 294.

The point is not whether the provisions of a statute which are adjudged to be unconstitutional are contained in the same section, for the distribution of sections is purely artificial, but whether they are essentially and inseparably connected in substance. If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

Cooley on Const. Lim.,

p. 178.

When part of a statute is unconstitutional this does not affect the validity of the remainder, unless the provisions are so interdependent that one can not operate without the other, or are so related, in substance and object, that it is impossible to suppose that the legislature would have passed the one without the other.

If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, it must be retained and this is so although the portion to be condemned is found in the *same section* with that sought to be retained.

People vs. Kinney,

96 N. Y., 294.

People vs. Kelly,

76 N. Y., 475.

People vs. Durston,

119 N. Y., 572.

The cases cited seem directly in point. In the first case an act for the election of aldermen in the City of New York contained a provision prohibiting the electors from voting for more than two-thirds of the whole number to be elected. An action of *quo warranto* was brought to test the title of the aldermen elected under the act, claiming that this provision was unconstitutional. The Court held that it was void for that reason, but that the aldermen were duly elected because it did not appear that any voter *claimed* the right to vote for all the six aldermen, and was *denied* that right.

It would be a most dangerous doctrine to establish, that where minor provisions of an act giving certain

powers to officers elected, or appointed thereunder, are unconstitutional, that the whole act is null and void.

Let us suppose for a moment that the village law had given to the village the right to establish works of its own, or to condemn the existing plant, but that the proceedings authorized for the latter purpose were expressed in such terms as to deprive the water company of its property without due process of law, and unconstitutional for that reason, and that the water company had successfully resisted an attempt to condemn its property under the act, could the water company then maintain an action restraining the village from establishing works of its own upon the ground that the taxpayers would not have voted for municipal ownership, unless they had believed that the village had power to condemn the existing plant?

The electors of the City of Syracuse voted for municipal ownership of the water system under an act, Chap. 61, Laws of 1886, which authorized condemnation proceedings against persons owning certain properties. The power to condemn their property was resisted by the owners upon the ground that the same was unconstitutional. (Case on appeal, 86 Hun, 441.) If it had been so held, could the old water company in the City of Syracuse have maintained an action restraining the establishment of water works by the city upon the ground that the electors would not have voted for municipal ownership had they not believed that the condemnation proceedings against such property authorized by the action were valid?

Whether the taxpayers of the Village of Skaneateles in voting that the village should establish a water system of its own were influenced in any manner by the pro-

visions for the taxation of the property of the plaintiff in the act of 1875, and the frontage tax authorized, but not required, by subsequent acts, is purely imaginary and speculative.

In order that a minor provision of an act, under which an election is required to be held, which turns out to be unconstitutional and void may affect the remainder of the act, or the result of the election, it must at least *affirmatively* appear that the voters were influenced by such unconstitutional provision. Where the provision is wholly minor to the main purpose of the act and easily separable therefrom, the other provisions of the law are not rendered unconstitutional, even though evidence was given that such unconstitutional provision influenced *some* of the votes cast at the election.

POINT

XVI.

The following are statements of statutes of the State of New York referred to in the briefs of counsel, or the material parts of the same.

The general village law and its amendments, under which the Village of Skaneateles was incorporated (Chapter 291, vol. 1 of Laws of 1870, Sec. 3 and 13, Title 3,) contains the following provisions:

"The trustees shall have power * * * to construct and maintain reservoirs and systems, and supply them with water for use at fires, and to protect and preserve property at fires, prevent fires and provide for their extinguishment."

This act contains no other provisions authorizing the trustees to supply the village with water, or contract for the supply.

Chapter 181, Laws of 1875, is entitled an act to authorize the villages of the State of New York to furnish pure and wholesome water to all inhabitants thereof. Sections 1 to 16 provide for the appointment of water commissioners and authorize them to establish water works for the village, and to borrow money upon the credit of the village to pay for the same and secure such payment by issuing of bonds and obligations of indebtedness. Section 15 of said act reads:

"The entire annual receipts for water rents after deducting therefrom such sums as may be necessary to defray the expenses of repairs of said water works, and of extending the same and other necessary expenses, shall be applied toward the payment of the interest on the loan hereinbefore authorized, and also toward the creation of a sinking fund for the payment of the principal of said loan, as it shall from time to time become due and payable, which sinking funds shall be managed by said commissioners."

Section 16 reads as follows:

"In case the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any year, not be *sufficient* to pay the interest for that year on said loans, or in case in any year when any of the principal of the loan secured by said bonds falls due, the amount of said receipts for water rents, after making said deduction, together with the sum in the said sinking fund, shall not be *sufficient* to pay said principal, and also the said interest falling due that year, it shall be the duty of the board of trustees of said village, and they are hereby directed to cause such deficiency to be assessed, levied and collected from the taxable property of said village at the

same time and in the *same manner* as other expenses of said village are assessed, levied and collected, and the same shall be applied to the payment of such interest or principal, or both."

This is the section relied upon by the appellant as unconstitutional, upon the theory that it authorizes the taxation of the plaintiff's water plant to meet any deficiency arising from water receipts.

Section 22 of the same act reads as follows:

"Whenever any corporation shall have been organized under the laws of this State for the purpose of supplying the inhabitants of any village with water, and it shall *become* or be *deemed necessary* by the Board of Water Commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty to make, or cause to be made, a thorough examination of the works, rights, privileges or properties owned or held by such corporations, or any of them, and *if such commissioners shall determine* that said works, rights, privileges and properties are necessary for the purpose of this act, they shall have the right to make application to the Supreme Court, at a special term thereof, held in the judicial district in which the works of such corporation are situated, for the appointment of three commissioners of appraisement, who shall be disinterested freeholders and residents of the County."

Then follow provisions for the appraisement and award of the property taken. Then come the following words:

"The awards made to the corporation whose rights and properties are so taken, shall be paid by the water commissioners herein authorized to be created from the proceeds of bonds, certificates or other obligation which are hereby authorized to be issued by such commissioners for such purpose, and thereupon all the rights, privileges, works, franchises and properties owned by said corporation, or held by it for its purposes, shall be vested in said village."

This is the provision under which the plaintiff claims that the village was bound to condemn the property of the appellant before establishing works of its own.

Chapter 129, Laws of 1879, amending the General Village Law, provides:

"The Board of Trustees also shall have power, and is hereby authorized to contract with any water company for supplying the village with water for the purpose of extinguishing fires, and to assess and collect the amount agreed to be paid in such contract as other village taxes are assessed and collected; and any such contract entered into by the trustees of any village shall be valid and binding upon such village: provided, however, that no such contract shall be made for a longer period than *five years* nor for a sum exceeding in the aggregate fifty cents per capita, per annum, of the population of the village, unless the proposition for the same be submitted to a vote of the citizens, in the manner provided in sections 4 and 5 of this title, and approved by a majority of the voters &c."

In 1889, the Legislature passed an act, (Chapter 507), entitled "An Act to authorize villages of the State of New York to establish water rates and collect

the same," reading as follows:

"Boards of water commissioners, acting under Chapter 181 of the Laws of 1875, and the acts amendatory thereto, may annually establish a scale of water rates for the use of water, also rates to be assessed upon all real property abutting on the streets where the pipes are laid. * * * Upon the completion of said assessment, the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees; upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes."

The last mentioned act was amended by Chapter 662 of the Laws of 1893, reading as follows:

"Boards of water commissioners, acting under Chapter 181 of the Laws of 1875, and acts amendatory thereof, may establish a scale of rates for the use of water, and also rates for fire protection to be assessed on all real property abutting on the mains, or within two hundred feet of the hydrants, the owners or occupants of which do not use the water for domestic or manufacturing purposes."

Then follow the provisions of the act amended for the collection of the tax in the same manner as other taxes.

Chapter 284 of the Laws of 1894 amends said law of 1879, reading as follows:

"Boards of water commissioners, acting under chapter 181 of the Laws of 1875, and acts amendatory thereof, may establish a scale of rates for the use of water and also rates for fire protection, to be assessed on all real property abutting on the mains or within

two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic or manufacturing purposes."

Then follow the provisions of the original act that the amounts assessed shall be collected in the same manner as other taxes.

In 1897 the Legislature passed an act, (Chap. 414) entitled "An act in relation to villages, constituting Chapter 21 of the 'general laws' and repealing the existing Village Law, providing as follows:

Sec. 220. "Contracts for water supply—The board of water commissioners may contract, in the name of the village, with an individual or corporation, for supplying water to the village for extinguishing fires or for other public purposes; but such contract shall not be made for a longer period than five years, nor at an expense for each fiscal year exceeding two and a half mills on every dollar of the taxable property of the village as appears on the last preceding village assessment roll, unless authorized at a village election."

Section 221. "Election for water works—A proposition may be submitted at a village election for the establishment of a system of water works for supplying the village and its inhabitants with water, or for the acquisition of an existing private system, at an expense in either case not exceeding the sum stated in the proposition."

Section 222. "Acquisition of existing system.—If a proposition be adopted for the acquisition of an existing system of water works, the board of water commissioners may purchase the same at a price not exceed-

ing the sum specified therein."

Section 230. "Assessment for fire protection—A building and the lot upon which it stands, in or on *which water from the water works is not used, situated* within five hundred feet of a hydrant, may be assessed by the board of water commissioners for fire protection. * * * Upon the completion of the assessment, the board shall make a certificate thereof and deliver the same to the village treasurer. The treasurer may receive such assessments for thirty days without fee; after that time an action may be brought to recover the assessment, or a special warrant may be issued therefor, or the amount may be included in the next annual tax levy."

The plaintiff was incorporated under the Water Companies' Act, Chapter 737 of the Laws of 1873. Section 2 of that act as amended by Chapter 171 of the Laws of 1877, reads as follows:

"Whenever any persons to the number of seven or more shall organize for the purpose of forming a water works company in any of the towns or villages of this state, they shall present to the town or village authorities *an application*, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds, springs, lakes or other sources, and their locations, from which water is to be supplied. * * * Upon the presentation of such application, the authorities of any town or village * * * shall determine by a vote of a majority of the authorities of said town or village, *whether said application shall be granted;* and the authorities of any town or village in this

state are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the persons *making such application*, or either of them. * * * The persons named in such application shall thereupon meet and organize as a water works company, under such corporate name as they may select."

Section 4. "Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered to lay their water pipes in any streets or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted."

Section 5 of the Act of 1873, as amended by Chapter 422 of the Laws of 1885, reads as follows:

"It shall be the *duty* of said corporation and they are *authorized* and *empowered* to supply the authorities or inhabitants of any town or village where they may have organized, with pure and wholesome water, at reasonable rates and cost to all consumers who may use the same, and the board of trustees of any incorporated village of this state, shall have the *power*, and they are hereby authorized and empowered to *contract* for a term of *one year or more* with any water company organized under the laws of this state, for the delivery by said company of water, through hydrants or otherwise, for the extinguishment of fires and for sanitary and other public purposes; and the amount of such contract agreed to be paid shall be annually raised as a part of the expenses of such village, and shall be levied, assessed and collected in the same

manner as other expenses of such village are raised, and when collected shall be kept separate from other funds of said village, and shall be paid over to such water commissioners by such trustees according to the terms and conditions of any such contract, and any such contract entered into by the board of trustees of any village shall be valid and binding upon such village, providing, however, that no such contract shall be made for a *longer period than five years*, nor for a sum exceeding in the aggregate two and one-half mills for every dollar of the taxable property of said village per annum, unless the proposition for the same be submitted to a vote of the electors of such village, in the manner provided by sections four and five of title four of chapter 270 * * * and any board of trustees, when so authorized, may contract for a term not exceeding *thirty years*.

Section 3 of the Laws of 1873, is amended by this act so as to read as follows:

"*Any corporation* organized under any law of this state or which may hereafter be so organized for the purpose of supplying any city, town or village with pure and wholesome water, shall have the power to enter into a contract with any other town or village, or the authorities thereof, in the county in which it shall have organized, or in any adjoining county for the purpose of supplying such town or village, or the inhabitants thereof, with pure and wholesome water, and said contract so made shall be as valid and binding, and of the like force and effect as if the said company had duly organized for said purpose, in such town or village."

Section 80 and 81 of the Transportation Corpora-

tion Law as amended by Chapter 566 of the Laws of 1892, reads as follows:

"Article VI, Water Works Corporation. Sec. 80. Incorporation—Seven or more persons may become a corporation for the purpose of supplying water to any of the cities, towns or villages and the inhabitants thereof in this state, by executing, acknowledging and filing a certificate stating the name of the corporation, the amount of its capital stock, the number of shares into which it is to be divided * * * the name of the cities, towns and villages which it is proposed to supply with water; that the permit of the authorities of such cities, towns and villages herein required has been granted."

Section 81. "Must supply water; village trustees or city officials may contract for same; tax therefor. Every such corporation shall supply the authorities or inhabitants of any city, town or village where they have organized with pure and wholesome water at reasonable rates and cost to all consumers who may use the same, and the board of trustees of any incorporated village, and the water commissioners or other board of officials performing the duties of water commissioners and having charge of the water supplies of any city of this state shall have power to contract for the term of one *year or more* with any such corporation for the delivery by it to the village or city of water, through hydrants or otherwise, for the extinguishment of fires and for sanitary and other public purposes, * * * but no such contract shall be made for a longer period than *ten years*, nor for a sum exceeding in the aggregate two and one-half mills for every dollar of the taxable property of such village or city per annum, unless a resolu-

tion authorizing the same has been submitted to a vote of the electors of the village or city * * * and any board of trustees or board of water commissioners, or other city officials, when so authorized, may make such a contract for a term not exceeding *thirty years*, and the amount of such contract shall be paid in semi-annual installments."

Also Chap 369 Laws 1884

POINT

XVII.

The judgment of the Court of Appeals of the State of New York should be sustained with costs.

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